Supreme Court, U.S.
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No. 96-232

In The

Supreme Court of the United States

October Term, 1995

GARY VICTOR DUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF BY PETITIONER

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Petitioner

6 pp

NOTICE OF NEW SEVENTH CIRCUIT DECISION

Pursuant to Rule 15.8, Petitioner hereby submits this Supplemental Brief to bring to the Court's attention the recent decision of the Court of Appeals for the Seventh Circuit in *United States v. Beals*, 87 F.3d 854 (1996), reported and discovered by Petitioner after the submission of his pending Petition for Writ of Certiorari, for the following reasons:

1. In Point 2 of his docketed Petition, Petitioner argues that his conviction and sentence on Counts II and III are illegal and unconstitutional *absent indictment*, for which alleged offenses he is presently incarcerated at Lompoc Federal Correctional Institution in California. The basis of his argument is that the recent addition of supervised release to existing Section 7203 failure-to-file twelve-month maximum sentences extends the *possibility* of imprisonment for *each* such offense beyond one year, making charging by Information in violation of Rule 7(a) of the Federal Rules of Criminal Procedure and the Indictment Clause of the Fifth Amendment.[1]

2. Petitioner supports his argument by reference in his Petition to the decision of his own Circuit in *United States v. Soto-Olivas*, 44 F.3d 788 (9th Cir. 1995), interpreting 18 U.S.C. § 3583 to make supervised release the same as a parole term under prior law, so that revocation punishment is part of the original punishment for the original crime and not for the

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[1] Petitioner was charged by Information, although U.S. Attorney erroneously issued "news release" upon arraignment claiming "a Federal Grand Jury indicted Dubin". See Petition, Appendix 28 note printing error at A-45: "indicated" should read "indicted".

supervised release revocation, in order to avoid a panoply of constitutional issues were revocation punishment for the violation itself, given the absence of traditional constitutional rights for those charged with such infractions and returned to prison.[2]

3. Indeed, among Petitioner's supervised release terms are the standard reporting terms as well as a requirement that he must "cooperate with the IRS" or may by a preponderance of the evidence as determined by Judge Manuel Real be returned to prison for up to one additional year for Counts II and III each not only without Indictment but without even Fifth or Sixth Amendment rights to trial by jury, defense counsel, and various due process guarantees otherwise available to criminal defendants such as the presumption of innocence unless proven guilty beyond a reasonable doubt.

4. In deciding *Beals, supra,* the Seventh Circuit has adopted the identical reasoning of the Ninth Circuit in *Soto-Olivas,* as earlier relied upon in *United States v. Paskow,* 11 F.3d 873 (9th Cir. 1993), in holding supervised release revocation imprisonment a part of the original punishment for the original crime committed. Explaining that its theory of legislative interpretation rejects the recidivist statutory analogy in favor of the parole model, the Seventh Circuit joined the Second, Fourth, and Ninth in their interpretation of Section 3583 statutory intent; see *United States v. Meeks,* 25 F.3d 1117 (2d Cir. 1994), *Paskow, supra,* and *United States v.*

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[2] A *term of supervised release* followed by revocation imprisonment is therefore identical in concept to a *term of parole* followed by revocation imprisonment. Neither parole nor supervised release terminate the *term of imprisonment,* but merely change the form of custody conditionally.

Parriett, 974 F.2d 523 (4th Cir. 1992), *Beals* expressly rejecting the opposite view recently voiced by the Sixth Circuit in *United States v. Reese,* 71 F.3d 582 (1995), which rejected *Soto-Olivas, supra.* And it now appears that the Third Circuit may be agreeing with the Sixth; see *United States v. Brady,* 3d Cir., No. 95-3660, decided June 28, 1996, reported in summary form in 59 *Criminal Law Reporter* 1344 (7/17/96) (not yet in advance sheets available to Petitioner).

5. While it is true that *Soto-Olivas* was a double jeopardy case, and *Beals, Meeks, Paskow, Parriett, Reese,* and *Brady* were *ex post facto* decisions, the principle of statutory interpretation is the same, for otherwise the circuit courts would be interpreting Section 3583 one way in deciding one constitutional issue and in an opposite manner with respect to Rule 7(a) and the Indictment Clause. Indeed, in the Indictment context an interpretation contrary to *Beals* would be even more offensive than would appear to be the case had *Beals* followed *Reese,* for as the Seventh Circuit explained in *Beals,* contrary to the analysis for instance in *Brady,* supervised release adds more time to the defendant's sentence than even the traditional parole periods, since with the addition of newly-enacted *subsection h* not only, for example, are failure-to-file "misdemeanants" now subject to the possibility of two years of imprisonment for each Section 7203 offense but also potentially years of supervised release restrictions on their freedom to travel, associate, report, and on their privacy rights.

6. Petitioner is in the peculiar position of supporting his Point 2 with *Soto-Olivas, supra,* a contrary panel decision in his own Circuit which his panel in its unpublished Memorandum chose to ignore, although other panels of the Ninth Circuit continue to adhere to and to extend the reasoning in

Soto-Olivas, most recently in *United States v. Pierce,* 75 F.3d 173, 177 (1996), again holding supervised release to be just like parole, added to the original sentence as the intent of Congress for purposes of applying the Assimilative Crimes Act by adding to an analogous state sentence more imprisonment time.

7. Rule 7(a) recites that "an offense which may be punished by imprisonment for a term exceeding one year- . . . shall be prosecuted by indictment". This Court where possible interprets Congressional intent so as to avoid constitutional issues, *Cheek v. United States,* 498 U.S. 192, 203 (1991). In determining a statute's "plain meaning" it is assumed "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning", *Pioneer Investment Services v. Brunswick Associates,* 507 U.S. 380, 388 (1993). "There is no more persuasive evidence of the purpose of a statute than by the words by which the legislature undertook to give expression to its wishes," *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982). If the language is clear, that is where "the inquiry should end", *United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989). And Rule 7(a) is that clear.

8. This Court would have no other way of upholding the constitutionality of Petitioner's sentences on Counts II and III except to depart radically from its historic interpretation of the Indictment Clause and to conclude untenably that an offense such as that charged by a Section 7203 Information exposing a defendant with revocation to up to a total of two years of imprisonment at, for instance, a medium high facility such as Petitioner's recent abode, Terminal Island FCI, and potentially years of on-again, off-again supervised release

terms, which qualify as "custody" for habeas corpus jurisdictional relief, under 18 U.S.C. § 3583(h) did not constitute punishment for an "infamous crime". That would mean that Congress, for instance, could conceivably decide to prescribe a one-year maximum sentence for an offense such as failure-to-file plus say five years or more of supervised release, resulting in imprisonment for six years or more "as part of the original punishment for the original crime" without supposedly violating the Indictment Clause while emasculating that Grand Jury protection.

Circuit Judge Cummings' thoughtful analysis in *Beals* deserves this Court's full attention in the consideration of Petitioner's Point 2 and in the assessment of the challenge to the wisdom of the federal judiciary posed by the uniqueness of supervised release sentencing now perplexing our circuit courts.

Respectfully submitted,

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California

September 4, 1996

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